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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,

Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA & VICINITY AND THE DAIRY INDUSTRY-UNION PENSION FUND OF PHILADELPHIA & VICINITY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

This brief, which urges the Court to affirm the decision below, is submitted on behalf of two multiemployer pension plans. The Teamsters Pension Trust Fund of Philadelphia & Vicinity ("Vicinity Fund") has approximately 30,000 participants who work for about 950 companies. The vast majority of the Vicinity Fund's participants

live in Pennsylvania, New Jersey, and Delaware. The Dairy Industry-Union Pension Plan of Philadelphia & Vicinity ("Dairy Plan") has approximately 3,300 participants employed by about twenty companies in that same area.

The Vicinity Fund and Dairy Plan have a special interest in this case, as they are both located within the jurisdiction of the United States Court of Appeals for the Third Circuit. An employer which seeks to challenge an assessment of withdrawal liability must do so by invoking arbitration under § 4221(a) of the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1401(a) ("MPPAA"). Ever since the decision in *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell*, 787 F.2d 128, 135-44 (3d Cir. 1986), *aff'd*, 481 U.S. 735 (1987) (equally divided Court), multiemployer plans governed by the Third Circuit have been denied the evidentiary presumptions in arbitration guaranteed to them by MPPAA § 4221(a).[1]

[1] Section 4221(a), 29 U.S.C. § 1401(a), provides, in relevant part, that:

> (3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 [29 U.S.C. § 1381] through 4219 [29 U.S.C. § 1399] of this title and section 4205 [29 U.S.C. § 1405] of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.
>
> (B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—
>
> > (i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
> >
> > (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

The petitioner in this case has, in effect, urged the Court to adopt the Third Circuit's position in *Yahn & McDonnell* (Petitioner's Brief at 24). Because any continuing vitality of *Yahn & McDonnell* threatens multiemployer plans with serious and adverse consequences, the *amici* herein request the Court to reject the Third Circuit rule.

Both the Vicinity Fund and Dairy Plan have been involved in withdrawal liability litigation for many years.[2] A variety of major cases presently in progress could be greatly affected by this Court's decision.

The Dairy Plan, for example, has asserted a claim for in excess of $10,000,000 in a case captioned *American Financial Corporation and Dairy Industry-Union Pension Fund for Philadelphia & Vicinity*, Case No. 146200005855.

[2] The Vicinity Fund currently have about ninety-three active withdrawal liability claims. The following list of opinions represents only a fraction of the actual court cases and arbitrations in which the Vicinity Fund has been involved: *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 857 F.2d 1107 (6th Cir. 1988); *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 830 F.2d 1241 (3d Cir. 1987); *Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 787 F.2d 897 (3d Cir. 1986); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Fuqua Industries, Inc.*, No. 90-6872, 1992 W.L. 70418 (E.D. Pa. 1992); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Custom Cartage Co.*, No. 89-0626, 1991 W.L. 160966 (E.D. Pa.), *aff'd*, 961 F.2d 1568 (3d Cir. 1992); *In re Cardon Realty Corp.*, 124 B.R. 630 (W.D.N.Y. 1991); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Laidlaw Industries, Inc.*, 745 F. Supp. 1016 (D. Del. 1990); *Philadelphia Journal, Inc. v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, No. 87-7637, 1989 W.L. 45865 (E.D. Pa.), *aff'd*, 891 F.2d 282 (3d Cir. 1989); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Malone Realty Co.*, 82 B.R. 346 (E.D. Pa. 1988); *In re Malone*, 74 B.R. 315 (E.D. Pa. 1987); and *Fox v. ABC Air Freight, Inc.*, Nos. 84-3698, 3934 & 4982, 1986 W.L. 14538 (E.D. Pa. 1986).

The Dairy Fund has also been involved in MPPAA arbitration. *Tuscan Milk Co. and Dairy Industry Union Pension Plan for Philadelphia & Vicinity*, 9 E.B.C. (BNA) 1618 (Kasher, Arb. 1988).

One of the principle issues in *American Financial* is whether American Financial sold one of its divisions that contributed to the Dairy Plan in order to avoid or evade withdrawal liability in violation of MPPAA § 4212(c), 29 U.S.C. § 1392(c). The facts surrounding that issue, which focus upon the corporate decisions, motivations, and transactions that led up to the divestiture, are obviously within the possession of the withdrawing employer. Some of the most crucial evidence is exclusively within the control of the employer. Under such circumstances, the Dairy Plan is faced with great obstacles in obtaining evidence through discovery, principally of hostile witnesses, and of not having witnesses of its own to the decisions, motivations, and transactions. As shall be illustrated herein, traditional rules of evidence—which have always been found consistent with the dictates of due process—permit the employer to bear the burden of proof on that issue. *See, infra*, n.10 and accompanying text. However, a strict reading of *Yahn & McDonnell* could deny the Dairy Plan the presumptions guaranteed to it by Congress and by common law principles.

Similarly, a claim which the Vicinity Fund has brought for approximately $2,100,000 against a corporate parent that divested itself of a subsidiary in order to avoid and evade withdrawal liability is presently in arbitration. *See Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 830 F.2d 1241, 1252-1255 (3d Cir. 1987) (remanding this issue to arbitration). The outcome of the case at bar obviously could have a substantial impact upon that claim. Many other actions involving the Vicinity Fund will be affected by the outcome of the present case.

In view of the significance of the MPPAA § 4221(a) presumptions, the Dairy Plan and Vicinity Fund submit this brief to the Court. For the reasons stated below, the decision of the Ninth Circuit should be affirmed and the holding of the Third Circuit should be rejected.

SUMMARY OF ARGUMENT

The real procedural due process issue before the Court is whether Congress has the power to assign the burden of proof to the withdrawing employer in a MPPAA arbitration. This question is easily answered in the affirmative for two reasons.

First, under the precedents of this Court, the Due Process Clause could not conceivably interfere with a burden of proof in civil litigation which involves mere monetary relief. An historical review, with emphasis upon the law in effect at the enactment of the Fifth Amendment, reveals a willingness on the part of courts to shift the burden of proof in order to reflect social policy. Nothing in the Due Process Clause suggests an intention to interfere with the type of presumptions set forth in MPPAA § 4221(a). This Court, moreover, has sustained the shifting of the burden of proof to defendants in such a wide variety of criminal and civil precedents that a due process challenge to MPPAA § 4221(a) has no constitutional mooring.

Second, and alternatively, this Court has recognized that Congress has plenary power to provide for the manner in which rights created by Congress are adjudicated. This power includes the prerogative to create presumptions and to assign burdens of proof. The presumption and burdens of proof codified in MPPAA § 4221(a) constitute a valid exercise of that power.

Apart from these considerations, the *amici* herein note that a decision by this Court upsetting MPPAA § 4221(a) could cause chaos for many types of litigation. The burdens of proof established by MPPAA are as constitutionally sound as those sustained by this Court in tax, expatriation, prison, and employee benefits cases. The constitutionality of the settled burdens of proof in these areas (as well as many common law presumptions) could be thrown into doubt if this Court were to endorse the Third Circuit's position in *Yahn & McDonnell*.

ARGUMENT

I. THE REAL PROCEDURAL DUE PROCESS ISSUE IN THIS CASE IS NOT WHETHER A WITHDRAWING EMPLOYER IS DENIED AN UNBIASED ADJUDICATOR, BUT WHETHER CONGRESS CAN PLACE THE BURDEN OF PROOF UPON AN EMPLOYER IN CHALLENGING A WITHDRAWAL LIABILITY ASSESSMENT.

According to the petitioner, MPPAA denies a withdrawing employer the constitutional right to an impartial adjudicator because the fiduciaries of the plan (collectively known as the "plan sponsor") are biased by an incentive to maximize the collection of withdrawal liability (Petitioner's Brief at 40-50). The Third Circuit essentially adopted this position in *Yahn & McDonnell*, 787 F.2d at 138-42. The underlying premise of the petitioner's argument is that the plan sponsor's "decision in computing, assessing and collecting withdrawal liability is *adjudicative* in nature." (Petitioner's Brief at 46, emphasis added). If this assumption is incorrect, then the petitioner's due process argument collapses for failure to establish a link between the plan sponsor's alleged "bias" and an adjudicative act. A review of MPPAA reveals that the plan sponsor's role is not even vaguely "adjudicative."

The statute specifically states that "[a]ny dispute between an employer and the plan sponsor concerning withdrawal liability is to be resolved by arbitration," MPPAA § 4221(a)(1), 29 U.S.C. § 1401(a)(1), and provides for subsequent judicial review, MPPAA § 4221(b)(2), 29 U.S. § 1401(b)(2). Arbitration, not the MPPAA assessment procedure, is the initial adjudication. There is no question that arbitration and judicial review provide withdrawing employers with unbiased decision makers. Therefore, the purported bias of the plan sponsor is not at issue.

This point is illustrated by *Marshall v. Jerrico, Inc.*, 446 U.S. at 238 (1980), which involved a challenge to a similar dispute resolution mechanism contained within the child labor laws. The statutory scheme in *Jerrico* authorized the United States Department of Labor ("DOL") to make the initial determination of civil liability for statutory violations. An employer could challenge such an assessment, initially by invoking the right to a hearing before an administrative law judge, and subsequently by seeking judicial review. The *Jerrico* plaintiff challenged the constitutionality of this scheme by charging that the DOL was: (1) the trier of fact in the first instance, and (2) biased because it stood to benefit from maximizing the collection of civil penalties. On this basis, the employer maintained that the DOL did not constitute a neutral adjudicator.

This Court disagreed, reasoning that the initial determination by the DOL was not a "judicial or quasi-judicial" function. Writing for the *Jerrico* Court, Justice Marshall explained that the "function of assessing a violation is akin to that of a prosecutor or civil plaintiff." *Id.* at 247. Because the statutory procedures provided for administrative and judicial review of the assessment by unbiased adjudicators, the due process challenge failed.

This case falls within the logic of *Jerrico*. The plan sponsor's actions in "assessing, calculating, and collecting" withdrawal liability are no more "judicial" in nature than the activities of the DOL in assessing, calculating, and collecting penalties under the child labor laws. The real *adjudication* occurs later, in arbitration which, if necessary, is followed by judicial review.

The only tangible distinction between the MPPAA statutory procedure presently under challenge and that upheld in *Jerrico* involves the *burden of proof*. In *Jerrico*, the administrative law judge exercised *de novo* review of the DOL's assessment whereas, under MPPAA § 4221(a)(3), 29 U.S.C. § 1401(a)(3), the employer has the burden of proof in overturning a withdrawal liability assessment. The constitutional validity of the apportionment of the

burden of proof is the real procedural due process issue before the Court.

In a sense, the Third Circuit's decision in *Yahn & McDonnell* highlights the extent to which this case turns on the burden of proof, rather than on the alleged bias of the adjudicator. The Third Circuit *did not* invalidate those portions of MPPAA which require the plan sponsor to assess, to calculate, and to collect withdrawal liability. Rather, *Yahn & McDonnell* simply severed the presumptions in favor of the plan sponsor from the statute.[3] Perhaps even more significantly, the Third Circuit stated the following with respect to the MPPAA procedure:

> The provision placing the initial determination in the hands of the trustees [*i.e.*, the plan sponsor] represents, in part, Congress' effort to capitalize on the expertise of persons experienced in and devoted to the pension fund process. Striking down only that provision would require deciding who should replace the trustees in *making the initial assessment* of liability—a matter not appropriate for judicial determination.

787 F.2d at 142 (emphasis added).

Thus, even the Third Circuit concedes that the MPPAA collection procedure involves the "initial assessment" of withdrawal liability. *Jerrico* teaches that such an "initial assessment" *is not* a judicial or quasi-judicial act. The only real procedural due process issue for this Court is whether the employer can be required to bear the burden of proof during the adjudication. Once the issue is properly characterized, the Third Circuit rule collapses.

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[3] Petitioner seeks basically the same relief from this Court (Petitioner's Brief at 48).

II. THE CONGRESSIONAL DECISION TO PLACE THE BURDEN OF PROOF UPON THE WITHDRAWING EMPLOYER IN MPPAA ARBITRATIONS FULLY COMPORTS WITH THE REQUIREMENTS OF DUE PROCESS.

Nothing in the Due Process Clause of the Fifth Amendment prevents Congress from apportioning the burden of proof in the manner set forth in MPPAA § 4221(a). This Court's precedents demonstrate two principles, either of which suffices to sustain the statutory presumptions. *First*, the Due Process Clause has never interfered with the apportionment of the burden of proof in civil litigation of this nature, which solely involves monetary relief. *Second*, Congress has the plenary power to create presumptions and to assign burdens of proof concerning rights created by federal legislation, such as MPPAA.

A. The Due Process Clause of the Fifth Amendment Does Not Implicate The Burdens of Proof Established by MPPAA.

The strongest point which can be made in support of the petitioner's due process argument is that a withdrawing employer is the rough equivalent of a defendant in civil litigation. It is true that the defendant usually bears the burden of proof in such cases. However, the general practice has so many well-established exceptions that any attempt to codify the plaintiff's burden of proof in the Due Process Clause of the Fifth Amendment can only be described as ludicrous. Indeed, this Court has even sanctioned shifting of the burden of proof in *criminal* cases.

Patterson v. New York, 432 U.S. 197 (1977) is the seminal precedent for determining whether the allocation of a burden of proof violates procedural due process. The case involved the constitutionality of a New York homicide statute which enabled the defendant in a murder trial to raise the affirmative defense of diminished capacity. The statute provided that a jury should return a conviction of manslaughter, rather than murder, if it

found that the victim had been killed while the defendant "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." The statute, moreover, provided that in litigating this issue, the defendant bore the burden of proof "by a preponderance of the evidence." *Id.* at 198-201.

The *Patterson* defendant, who had been convicted of murder after unsuccessfully arguing diminished capacity, contended that his right to due process had been violated by requiring him to bear the burden of proof. This Court affirmed the conviction on the following basis:

> In determining whether New York's allocation to the defendant of proving the mitigating circumstances of severe emotional disturbance is consistent with due process, it is . . . relevant to note that this defense is a considerably expanded version of the common-law defense of heat of passion on sudden provocation and that at common law the burden of proving the latter, as well as other defenses—indeed, "all . . . circumstances of justification, excuse or alleviation" —rested on the defendant. 4 W. Blackstone, Commentaries *201; M. Foster, Crown Law 255 (1762) . . . *This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified. Commonwealth v. York*, 50 Mass. 93 (1845).

Id. at 202 (emphasis added, footnotes omitted).

In short, *Patterson* stands for the proposition that the burden of proof that was generally accepted at the time that the Due Process Clause was added to the Constitution passes constitutional muster. The reason for the principle is understandable. Barring evidence to the contrary, the Framers of the Bill of Rights are not likely to have intended to outlaw a judicial practice which was universally accepted in their day.

Significantly, the position of the *Patterson* defendant was much stronger from a procedural due process viewpoint than that of the petitioner in this case. *Patterson* involved a criminal prosecution in which procedural safeguards receive the highest degree of protection under the law. The *Patterson* Court, nonetheless, upheld the burden of proof placed upon the defendant, explaining that "[t]raditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interest against those of the accused *have been left to the legislative branch.*" *Id.* at 210 (emphasis added). A similar result is even more appropriate in this case, which involves a purely monetary dispute concerning the method in which Congress determined to apportion pension liability.[4]

Application of the historical analysis demonstrated by *Patterson* to the burdens of proof set forth in MPPAA demonstrates the total absence of any constitutional infirmity. The common law principles contemporaneous with the Due Process Clause of the Fifth Amendment discredit any suggestion that Congress could not apportion the burden of proof to a withdrawing employer under MPPAA.[5]

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[4] This Court has upheld other burdens of proof upon the accused in criminal cases. *Martin v. Ohio*, 480 U.S. 228, 236 (1987) (upholding requirement that a defendant in a criminal case bear the burden of proof on self-defense); *Leland v. Oregon*, 343 U.S. 790, 798-99 (1952) (requiring *defendant* in criminal case to bear the burden of proof "beyond a reasonable doubt" on insanity defense); *Morrison v. California*, 291 U.S. 82, 85-90 (1934).

[5] In another sense, the petitioner herein has a weaker position than the *Patterson* defendant as this case involves a challenge to a federal statute. The historical inquiry, therefore, should focus upon the enactment of the Fifth Amendment in 1791, rather than that of the Fourteenth Amendment, adopted in 1866, which governs state statutes.

This point, however, is not essential to the outcome of this case. MPPAA § 4221(a) passes muster regardless of which vantage point is selected.

1. *Common Law Jurisprudence Apportioned the Burden of Proof to Defendants in Many Contexts.*

a. *Tort Litigation*

At common law, defendants in civil tort litigation bore burdens of proof much greater than those assigned to a withdrawing employer under MPPAA. English courts virtually subjected civil defendants to absolute liability in tort. As noted by one commentator in the Yearbook of Edward IV, who would later become Chief Justice Brian of the Court of Common Pleas, "if a man commits an assault upon me and I cannot avoid him if he wants to beat me and I lift my stick in self-defense in order to prevent him, and there is a man in back of me and I injure him in lifting my stick, in that case he would have an action against me, although my lifting the stick was lawful to defend myself and I injured him without intent." *Anonymous*, King's Bench, Y.B. Edw. IV, f.7, pl. 18 (1466).

Similarly, the famous "trainband" case of *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616) arose from an injury in which one militiaman accidentally wounded a comrade during a training exercise. The injured militiaman sued for damages. The King's Bench ruled for the plaintiff, explaining that "no man shall be excused of a trespass . . . except it may be judged utterly without his fault." The following passage explains the type of showing which a defendant would have to make to escape liability:

> As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances, so as it appeared to the Court that it had been inevitable and that the defendant had commited no negligence to give occasion to the hurt.

This severe apportionment of the burden of proof sprang from social policy. Common law courts were primarily interested in maintaining the King's Peace, and feared that failure to compensate injuries would lead to private acts of vengeance. The pro-plaintiff policy evident in *Weaver v. Ward* sought to encourage litigation rather than private vendettas. W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 4, at 21 (5th ed. 1984).

The strict liability rule of *Weaver v. Ward* and its related precedents remained in effect in England until well into the twentieth century.[6] While this pro-plaintiff policy eroded more quickly in the United States, it remained fully in effect at the time that Due Process Clause of the Fifth Amendment was added to the Constitution. Indeed, the first precedent which clearly placed the burden of proof upon the plaintiff in a tort case was the famous opinion of the Supreme Judicial Court of Massachusetts, authored by Chief Justice Lemuel Shaw, in *Brown v. Kendall*, 60 Mass. (6th Cush.) 292 (1850). Most jurisdictions eventually adopted that holding *Brown v. Kendall*. Keeton, *supra*, § 29 at 163. This Court did so in *The Nitroglycerin Case*, 82 U.S. (15 Wall.) 524, 538-39 (1873).

Significantly, the shift from the pro-plaintiff position of *Weaver v. Ward* to the defense-oriented holding of *Brown v. Kendall* was not based upon any view of civil defendants' inherent rights. Rather, the change reflected an effort to bring the law in accord with the courts' evolving view of public policy. Oliver W. Holmes, *The Common Law* 83-103 (Howe ed. 1963).

The historical development of the "burden of proof" in tort litigation demonstrates that any challenge to the MPPAA presumptions collapses under the weight of common-law history in accordance with *Patterson*. Judicial precedents such as *Brown* and *Nitroglycerin* did not shift the burden of proof in civil litigation to the plaintiff until over a half century after the adoption of the Due

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[6] The doctrine was not eliminated until the decision of *Fowler v. Lanning*, [1959] 1 Q.B. 426.

Process Clause of the Fifth Amendment, and the situation was still fluid at the enactment of the Fourteenth Amendment. Hence, the petitioner cannot successfully contend that the drafters of the Due Process Clause intended to prevent Congress from apportioning the burden of proof to a party similarly situated to a withdrawing employer under MPPAA.

Perhaps more importantly, a decision by this Court finding a procedural due process defect in apportionment of the burden of proof under MPPAA could seriously impair the ability of Congress, other legislative bodies, and state courts to adjust the law to meet present day needs. *Brown v. Kendall* was by no means the last word in apportionment of the burden or proof in tort litigation. The late nineteenth and early twentieth centuries saw continued evolution of the burden of proof, reflecting an evolution in public policy. *See, e.g.*, Edward H. Levi, *An Introduction to Legal Reasoning* 8-27 (1949) (discussing the changes in tort law during that time period). Proper apportionment of these burdens continues to generate spirited debate, and can be expected to do so in the future.[7] This changing process is necessary if American jurisprudence is to grow with society.

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[7] For example, in the area of products liability one commentator has noted that, "[i]n recent years, some courts have held that policy considerations as to who should bear the risk of loss when the precise manufacturer cannot be identified justifies allocating the risk of loss to two or more or even a large group of manufacturers, anyone of whom could have been the manufacturer, as when each one of a group of manufacturers makes and sells an identical type of product, such as a generic drug." Keeton, *supra*, § 103 at 713. The noted case of *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, *cert. denied*, 449 U.S. 912 (1980) is commonly cited as support for this pro-plaintiff apportionment of burdens. Some courts, however, have taken the contrary viewpoint. *See e.g., Tidler v. Eli Lilly & Co.*, 851 F.2d 418 (D.C. Cir. 1988) (applying District of Columbia and Maryland law); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D. S.C. 1981); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986); *Payton v. Abbott Laboratories*, 386 Mass. 540, 437 N.E.2d 171 (1982).

A decision by this Court which, in effect, guaranteed that defendants would bear the burden of proof in all civil litigation not only would flout the common law history which is dispositive under *Patterson*, but also would dampen future evolution of the law. To prevent that untoward result, this Court should reaffirm the ability of the law to adjust burdens of proof to reflect societal needs and changes.

b. *Other Policy Questions*

Tort law is only one example in which social policies have affected the burden of proof. Courts have often adjusted the burdens of proof as a means of "handicapping a disfavored contention." 2 McCormick, *Evidence* § 337 at 429 (4th ed. 1992). For example, defendants have the burden of proof in establishing a variety of affirmative defenses which the law is reluctant to recognize, such as contributory negligence, the statute of limitations, and duress. *Id.; Mason v. United States*, 84 U.S. 67, 74 (1873) ("Duress, if proved, may be a defence to an action, and it would doubtless be sufficient to relieve a party from the effect of compromise which was procured by such means, but the burden of proof to establish the charge, in every such case, is upon the party making it . . . .").

Courts have also traditionally disfavored a finding that a child was born illegitimate. Therefore, there has long been a presumption that a child born to a married woman is also the child of that woman's husband.[8]

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[8] "That a child born of a married woman during wedlock is presumed to be the child by her then husband is uniformly conceded. The only doubt has been whether and how far this presumption is conclusive . . . ." 9 Wigmore, *Evidence* § 2527 at 584-89 & nn. 1-4 (Cadbourn rev. 1981) and at 911-12 (1992 Supp.) (citing authorities from England, Canada, the Philippines, forty states, the District of Columbia and Puerto Rico).

Slavery offers another interesting illustration of how social policy affects the burden of proof in civil litigation. Although English

This Court, moreover, specifically enforced a presumption against a defendant in *Dick v. New York Life Insurance Company*, 359 U.S. 437 (1959). The case arose when the plaintiff sued an insurance company for double indemnity benefits after the death of her husband caused by gun-shot wounds. The defendant relied upon language in the governing policy which withheld double indemnity payments for death by suicide. In accordance with North Dakota law, which was controlling, the trial court instructed the jury that the defendant "had the burden to show by a fair preponderance of the evidence that [the decedent] committed suicide." *Id.* at 442. Although the Court of Appeals for the Eighth Circuit reversed, this Court reinstated the jury verdict. Chief Justice Warren, author of the opinion, explained that "[i]n a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide." *Id.* at 446.

As one commentator has noted, "the holding of the Court in *Dick*" and related legal developments "make it extremely unlikely that there are now serious constitutional limits on the effect that may be given to presumptions in civil cases." 2 McCormick, *supra* § 345 at 479.[9]

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common law recognized the status of villenage, or serfdom, courts were hostile toward the institution. Therefore, in any litigation focusing on whether an individual was a serf, the burden of proof rested upon the party attempting to establish villenage, regardless of whether that party was a plaintiff or a defendant. *See* A. Leon Higginbotham, *In the Matter of Color* 339 (1978). This presumption in favor of freedom figured prominently in *Somersett v. Stewart*, 13 Geo. 3 (Easter Term 1772), an opinion by Lord Mansfield, which effectively outlawed slavery within England. Higginbotham, *supra* at 341-344.

[9] *See also* Wigmore, *supra*, Chapter 90 "Burdens and Presumptions in Specific Issues," §§ 2500-2540 (discussing legal presumptions and the burdens of proof in such diverse areas as, *inter alia*, testamentary sanity, § 2500; criminal sanity, § 2501; undue influence and fraud, §§ 2502-03; marriage, § 2505-06; loss by a bailee, § 2508; defective machinery, § 2509; self-defense and alibi, § 2512; possession of stolen goods, § 2513; alteration of documents, § 2525; continuity of ownership, § 2530; continuity of life, § 2531; death, §§ 2537a-e; survivorship in a common disaster, § 2532; similarity of foreign law, § 2536; and malicious prosecution, § 2539).

Conversely, a decision by this Court adopting the Third Circuit's position in *Yahn & McDonnell* would turn each of these presumptions into a new constitutional case.

c. *Apportionment of the Burden to the Party with Superior Access to the Facts*

The burden of proof has also been apportioned under the principle that:

> [W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden or proving the issue. Examples of the burdens commonly placed upon the defendant to prove payment, discharge in bankruptcy, and license.

2 McCormick, *supra*, § 337 at 429. This doctrine has deep roots in the common law, predating the enactment of the Due Process Clause. William H. Bailey, *Onus Probandi* 1 (1886) ("In every case the *onus probandi* lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant."). *See also*, 3 William Blackstone, *Commentaries* *366 ("[P]roof is always first required upon that side which affirms the matter in question.").

The concept that the party with "peculiar knowledge of the facts" should bear the burden of proof is particularly appropriate in many aspects of MPPAA litigation. For example, in the case at bar one of the issues litigated before the arbitrator was the date of the withdrawal. The facts central to that question hinged upon the petitioner's operations in 1981 (Petitioner's Brief at 12-14). The petitioner, and not the pension fund, obviously had possession of the relevant facts. Therefore, common law

principles would assign the burden of proof on such an issue to withdrawing employers.[10]

2. *The Precedents of this Court Have Steadfastly Refused to Interfere with Burdens of Proof in Analogous Situations.*

The decisions of this Court add further weight against the petitioner's position. *Lavine v. Milne*, 424 U.S. 577 (1976) involved the validity of a New York welfare statute that denied benefits for seventy five days to individuals who voluntarily ceased employment. The plaintiff challenged a provision in the statute which assigned to him the burden of proof on the issue of whether he had voluntarily quit his prior job. This Court upheld the New York statute explaining that:

> Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application. It may be that establishing the absence of an illicit motive—as § 131(11) requires appellees to do—is difficult, although as appellant argues, an applicant's motive should be best known by the applicant himself. However that may be, it is not for us to resolve the question of where the burden ought to lie on this issue. *Outside the criminal law area,*

[10] This principle would apply to several other issues which commonly arise in MPPAA litigation. For example, an employer may defeat or reduce a withdrawal liability assessment by demonstrating that: the plan's calculations include contribution base units attributable to a facility which ceased prior to September 26, 1980, MPPAA § 4217, 29 U.S.C. § 1397; the employer ceased to exist due to a mere change in corporate structure without interruption of contributions, MPPAA § 4218(1), 29 U.S.C. § 1398(1); contributions were suspended by a labor dispute, MPPAA § 4218(2), 29 U.S.C. § 1398(2); the employer has liquidated or disposed of its assets by an arm's length transaction, MPPAA § 4205, 29 U.S.C. § 1405. These issues are in the nature of affirmative defenses. Furthermore, these aspects of the statute, like the "avoid or evade" provision of MPPAA § 4212(c), 29 U.S.C. § 1392(c), turn on facts "peculiarly within the knowledge" of the employer.

> *where special concerns attach, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.*

Id. at 585 (emphasis added). No reason exists to reach a different conclusion in the context of MPPAA.

This Court has permitted the burden of proof to be assigned to parties attempting to vindicate interests much more serious than simply money. As indicated above, *Patterson* and its related precedents have demonstrated this point in the context of criminal law, where constitutional protections are at their apex. Other such examples exist.

In *Vance v. Terrazas*, 444 U.S. 252 (1980), this Court upheld Congress' apportionment of the burden of proof in expatriation proceedings. The case arose when the State Department determined that an individual, Terrazas, had lost his United States citizenship. The governing statute, the Immigration and Nationality Act, 8 U.S.C. § 1481, contained two provisions related to the burden of proof. The first provided that the State Department could prevail by simply showing by a preponderance of the evidence that Terrazas had *voluntarily* renounced his American citizenship. The second, and for present purposes more important, provision created a presumption in favor of voluntariness when an individual committed an act outwardly signifying expatriation. This presumption weighed against Terrazas, who had signed a declaration of allegiance to Mexico. The Court of Appeals for the Seventh Circuit invalidated the statute on the ground that the State Department was obligated to prove its case by "clear and convincing evidence." This Court reversed.

With the respect to the first issue, the general burden of proof, the *Terrazas* Court noted that "expatriation proceedings are civil in nature and do not threaten a loss of liberty." Therefore, this Court refused to interfere with the "congressional judgment" concerning the apportionment of the burden of proof. 444 U.S. at 266-267.

With respect to the evidentiary presumption, which shifted the burden of proof to *Terrazas*, this Court stated:

> To invalidate the rule here would be to disagree flatly with Congress on the balance to be struck between the interest in citizenship and the burden of the Government must assume in demonstrating expatriating conduct. It would also constitutionalize the disagreement and give the Citizenship Clause of the Fourteenth Amendment far more scope in this context than the relevant circumstances that brought the Amendment into being would suggest appropriate. Thus we conclude that the presumption of voluntariness included in [the statute] has continuing vitality.

Id. at 550.

Terrazas demonstrates that Congress has the right to apportion the burden of proof in determining whether an individual retains the precious *constitutional* right of United States citizenship. In light of that decision, it is inconceivable that the Due Process Clause could impair Congress' apportionment of the burden of proof in determining whether a corporation pays withdrawal liability.

Further support for the evidentiary presumptions in MPPAA § 4221 comes from the highly specialized area of death penalty law. *Walton v. Arizona*, 497 U.S. 639 (1990) considered the constitutionality of an Arizona statute which provided that a convicted defendant could avoid execution by establishing mitigating factors, such as diminished capacity, duress, limited participation in the underlying offense, an inability to foresee that the conduct in question would cause another's death, or youthful age. Significantly, the Arizona statute also provided that "the burden of establishing mitigating circumstances is on the defendant." *Id.* at 3052.

The *Walton* defendant argued before this Court that the statute violated, *inter alia*, procedural due process by assigning the burden of proof to him on the issue of

mitigation. Citing *Patterson*, *Martin*, and related precedents, this Court held that "a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Id.* at 3055. Again, if the state of Arizona could apportion the issue of mitigation to the defendant in a death penalty case, no reason exists to deny Congress the right to assign the burden of proof to a withdrawing employer under MPPAA.

B. Congress' Plenary Power to Establish the Burden of Proof Concerning Rights Created by Federal Legislation Further Undermines the Petitioner's Due Process Position.

The cases cited above to support flexibility in the apportionment of burdens of proof involve rights which were either created by the United States Constitution itself, *e.g.*, citizenship in *Terrazas*, or by state law, *e.g.*, welfare benefits in *Lavine*. The congressional power to set burdens of proof is even greater with respect to rights that arise wholly from federal legislation. As the plurality explained in *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, 459 U.S. 813 (1982):

> [W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, *to create presumptions, or assign burdens of proof*, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.

Id. at 83 (emphasis added). This statement reflects the current status of the law.[11]

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[11] Every lower court case to consider the issue has found that the passage from the plurality opinion in *Northern Pipeline* quoted above accurately reflects the views of this Court. *In re Walters*, 868 F.2d 665, 670 (4th Cir. 1989); *In re Mankin*, 823 F.2d 1296, 1304 (9th Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988); *United*

The logic of *Northern Pipeline* mandates the affirmance of the Ninth Circuit ruling below. Congress created MPPAA. Consequently, Congress has plenary power to establish the presumptions and burdens of proof incidental to the statute.

The rationale for deference to Congress is particularly compelling under the facts of this case. *Pension Benefit Guaranty Corp. v. R.A. Gray*, 467 U.S. 717, 734 (1984) unanimously sustained MPPAA against another challenge based upon the Due Process Clause of the Fifth Amendment. This Court held that, even if applied retrospectively, the statute reflects a rational legislative attempt to deal with the threat to the pension system caused by employer withdrawals. In enacting MPPAA, Congress also concluded that the burdens of proof established by MPPAA § 4221(a), "are necessary to ensure the enforceability of employer liability." *See* The Report of the House of Representatives' Committee on Education and Labor, 1980 U.S. Cong. & Admin. News 2918, 2954. Nothing in the Due Process Clause provides a basis for this Court to second-guess that conclusion.

Ironically, prior to *Yahn & McDonnell*, the Third Circuit recognized that *Northern Pipeline* sustains the MPPAA procedural scheme. In *Terson Company* v. *Bakery Drivers & Salesmen, Local 194*, 739 F.2d 118 (3d Cir. 1984), the employer challenged the constitutionality of the MPPAA dispute resolution scheme as a denial of the right to a trial by jury. The Third Circuit cited the very

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Transportation Union v. Consolidated Rail Corporation, 593 F. Supp. 1346, 135 (Regional Rail Reorg. Ct. 1984).

Also, in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), this Court cited the plurality opinion in *Northern Pipeline* as authority for sustaining the dispute resolution mechanism of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y which, like MPPAA, directs disputes to arbitration. *Thomas* provides further support for Congress' plenary power to determine the manner in which disputes concerning federal statutory rights are resolved.

language from the plurality opinion in *Northern Pipeline* quoted above as authority for upholding the MPPAA arbitration scheme, reasoning that MPPAA arbitration is the type of "particularized tribunal" to which Congress could assign the resolution of statutory rights. *Id.* at 121. Yet, the same language in *Northern Pipeline* which states that Congress can assign resolution of disputes to a "particularized tribunal" also states that Congress can "create presumptions" and "assign burdens of proof." Hence, even the case law of the Third Circuit—the only jurisdiction to accept the rationale offered by the petitioner herein—recognizes that *Northern Pipeline* and its related authorities further undermine the due process challenge to MPPAA § 4221(a).

III. A DECISION OF THIS COURT OVERTURNING THE BURDENS OF PROOF ESTABLISHED BY MPPAA § 4221(a) COULD CAUSE CHAOS FOR THE ENFORCEMENT OF OTHER STATUTES AND THE CONDUCT OF MANY FORMS OF LITIGATION.

As previously discussed, the burden of proof established by MPPAA is on as sound a constitutional footing as those burdens upheld in cases such as *Patterson v. New York*, *Martin v. Ohio*, *Leland v. Oregon*, *Morrison v. California*, *Dick v. New York Life Insurance Company*, *Lavine v. Milne*, *Vance v. Terrazas*, and *Walton v. Arizona*. This Court, therefore, cannot affirm the Third Circuit's doctrine in *Yahn & McDonnell* without calling into question the validity of these precedents. In that event, the Court would also be inviting new challenges to established burdens of proof in criminal law, tort law, welfare litigation, expatriation proceedings, and even the death penalty. No reason exists to engender such a tidal wave of relitigation.

Furthermore, adoption of the *Yahn & McDonnell* standard could throw the enforcement of a variety of other federal statutory and constitutional schemes into chaos. The following are a few examples of this phenomenon.

A taxpayer bears the burden of proof in litigation with the Government. *United States v. Janis*, 428 U.S. 433, 440 (1976) ("The policy behind the presumption of correctness and the burden of proof would appear to be applicable" for both "tax collection" suits and "tax refund" suits); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289-90 (1929). No principled reason exists for giving a taxpayer a more serious burden of proof than a withdrawing employer under MPPAA. Hence, adoption of the *Yahn & McDonnell* stadard could threaten the federal tax system.

Similarly, this Court has mandated substantial burdens of proof upon prisoners in constitutional litigation. As explained in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977), "[b]ecause the realities of running a penal institution are complex and difficult, we have . . . recognized the wide-ranging deference to be accorded the decisions of prison administrators." Even when attempting to vindicate constitutional rights, prisoners cannot prevail unless they can show that the challenged decision was not "rationally related" to the "reasonable" objectives of "prison administration." *Thornburgh v. Abbott*, 490 U.S. 401, 409 (1989).

If this Court were to adopt the Third Circuit position in *Yahn & McDonnell*, then prisoners could very well use the precedent to mount a challenge to the burden of proof established by *Jones* and related authorities. Prisoners could argue that they, like withdrawing employers under MPPAA, are challenging the decision of an agency with which they stand in an inherently adversarial relationship. Citing the rationale of *Yahn & McDonnell*, they could assert that the heavy burden of proof set forth in *Jones*, which incidentally far outweighs anything in MPPAA § 4221(a), subjects prisoners to an inherently biased adjudicatory procedure. Of course, the flaw in the prisoners' position would be the same as that of the petitioner advanced herein; *viz.*, the initial agency action is not "adjudicatory" in nature. However, no principled

basis exists for this Court to overturn the MPPAA procedural scheme while sustaining the current body of prison jurisprudence.

Similarly, rejection of the MPPAA presumptions would impair the continuing vitality of this Court's decision in *Firestone Tire & Rubber Company v. Bruch*, 489 U.S. 101 (1989). In *Bruch*, this Court held that the decision of a fiduciary of an employee benefit plan to deny benefits to a participant deserves deference as long as the plan document grants the sponsor discretion to resolve such employee benefit claims. *Id.* at 111. Significantly, *Bruch* held that any bias on the part of a plan fiduciary would be judged on a case-by-case basis, rather than by a structural challenge of the type urged herein by the petitioner. *Id.* at 115.

It is impossible to draw a distinction for constitutional purposes between the burden of proof set forth in MPPAA § 4221(a) and the deference recognized by this Court in *Bruch*. There is no doubt that the *Bruch* rule passes constitutionl muster. Indeed, the Court emphasized that the precedent has common law roots of the type which insulates it from constitutional attack under *Patterson*. *Id.* at 110-15. Nevertheless, if this Court renders an opinion which holds that MPPAA § 4221(a) establishes a biased adjudicatory process, then *Bruch* would necessarily fall as *Bruch* also mandates deference to the actions of a plan sponsor.

CONCLUSION

The *amici* herein realize that eminent scholars and jurists have debated the underpinnings of procedural due process. One school of thought, which follows the logic of *Patterson v. New York*, provides that:

> All theories of constitutional law not based on the original understanding [of the Framers] contain inherent and fatal flaws. That is true whether the theories are liberal or conservative.

Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 251 (1991). MPPAA § 4221(a)

clearly survives under this analysis. The common law tradition in effect at the time that the Framers enacted the Due Process Clause demonstrates that nothing in the underlying intent of the provision conceivably supports a challenge to MPPAA § 4221(a).

Another well recognized philosophy contends that due process must be "open to judicial elaboration in accord with the changing views of fundamental fairness." Laurence H. Tribe, *American Constitutional Law* 670 (1988). MPPAA § 4221(a) also survives under this analysis. As discussed above, this Court has sustained burdens of proof ranging from expatriation to the death penalty which are no more severe than what the petitioner herein confronts. No concept of "fundamental fairness" would question this attempt by Congress to improve the pension system in the United States.

For the foregoing reasons, the Vicinity Fund and the Dairy Plan pray the Court to affirm the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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